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No. 81-2162

In the Supreme Court of the United States

OCTOBER TERM, 1981

PIONEER FINISHING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board abused its discretion in refusing to defer to an arbitration decision that did not resolve the unfair labor practice issue presented to the Board.

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OPINIONS BELOW

Portions of the opinion of the court of appeals (Pet. App. A-1 to A-10) are reported at 667 F. 2d 199.[1] The decision and order of the Board (Pet. App. A-11 to A-95) are reported at 247 N.L.R.B. 1299.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1981. A petition for rehearing was denied on December 23, 1981 (Pet. App. A-114). Justice Brennan granted an extension of time within which to file the petition to May 22, 1982 (Pet. App. A-115), and the petition was filed on that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

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[1] We have lodged a copy of the opinion of the court of appeals with the Clerk of this Court.

STATEMENT

1. In late 1977, petitioner and Textile Workers Union of America, Local 1057, which represents production and maintenance employees at petitioner's textile factory, negotiated a new collective agreement (Pet. App. A-2, A-22). The agreement was reduced to writing in April 1978. When Union shop chairman Pacheco discovered that the written contract did not contain a health and safety clause, he pointed out the omission to the Union's general manager, Kenneth Dufault.[2] Dufault had not participated in the contract negotiations. He therefore questioned petitioner's representatives about the asserted omission. They advised him that the parties had intended to establish the health and safety committee only on a trial basis, and further that petitioner was to select all members of the trial committee (Pet. App. A-22 to A-23). The Union scheduled an employees' meeting for May 7, to discuss the omission of the health and safety clause from the contract (Pet. App. A-23).

After consulting Pacheco and shop steward George Cummings, a group of employees drafted a leaflet concerning the omission of the health and safety clause (Pet. App. A-23). The one-page leaflet (Pet. App. A-92 to A-93), entitled "Fight For Safety Now * * * Before It's Too Late," stated in pertinent part (Pet. App. A-2 to A-3):

> Pioneer Finishing is a dangerous place to work. * * * In 1977 alone, there were 28 serious accidents resulting in 2,248 hours of lost time and wages! Which

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[2]Pacheco thought the agreement included establishment of a health and safety committee comprised of two members selected by the Union and three members selected by petitioner (Pet. App. A-44 to A-45; Tr. 727).

"Tr." refers to the transcript of the unfair labor practice proceedings before the Board.

> of us will be victims of these crippling accidents in 1978? How many of us risk accidents daily because of holes in the floor, falling lights, defective trucks and machinery, etc? Only an effective Health & Safety Committee can ensure a safer future for us all. * * *
>
> The company wants the Health & Safety clause striken from the contract. * * * The reason the company wants this is clear. After all, an effective Health & Safety Committee forcing the company to fix the hazards affecting you and I is bound to cost them money. * * * [3]

Under the heading "What Must We Do to Force The Company to Back Down" the leaflet urged employees to show the Union that the health and safety committee was "too important * * * to give up" by (1) attending the May 7 meeting, (2) encouraging fellow employees to attend that meeting as well, and (3) reporting safety and health problems to union representatives. The leaflet had been approved by Pacheco, and his name and union office appeared on the leaflet (Pet. App. A-93).

On May 2, Pacheco entered petitioner's facility to distribute copies of the leaflet to employees working on the second shift. Pacheco sought out shop steward Cummings, who then accompanied Pacheco while he distributed the leaflet. Pacheco and Cummings proceeded to a dyehouse; Pacheco showed the leaflet to the foreman and then distributed it to employees in the dyehouse. Pacheco and Cummings proceeded to another dyehouse; Pacheco handed the

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[3]The factual data were derived from a Summary of Occupational Injuries and Illnesses for 1977, posted by petitioner on a bulletin board in its facility, which stated that 28 injuries occurred in 1977 and that a total of 281 days of lost work time resulted from nine of the injuries. The authors of the leaflet arrived at the figure of 2,248 lost hours by multiplying the number of lost days by the number of work hours in each day, eight (Pet. App. A-40 to A-41).

leaflet to the dyehouse foreman, and then distributed copies to the other employees (Pet. App. A-23 to A-25). The employees did not stop running their machines to receive the leaflet (Pet. App. A-35 to A-36). Distribution of the leaflet in each of the dyehouses was completed in ten to fifteen minutes (Pet. App. A-25).

On May 5, petitioner's president suspended Pacheco. The stated reason for the suspension was Pacheco's distribution of the leaflet. More specifically, Pacheco's suspension letter stated that he had distributed the leaflet without clearance from management and failed to use the contractually specified method of posting notices on the facility's bulletin board. The suspension letter also stated that the leaflet was "libelous, misleading, false and inflammatory" because: the 28 accidents in 1977 were not all "serious" or "crippling"; the leaflet suggested that petitioner opposed an effective health and safety committee to avoid increased costs and did not intend to live up to its contractual obligations; and the leaflet was meant to "incite workers to possible illegal acts or actions" (Pet. App. A-25 to A-26). Petitioner discharged Pacheco within a week after the suspension for the same reasons (Pet. App. A-29).

The Union took Pacheco's case to arbitration under the collective bargaining agreement. The arbitrator found that Pacheco had been "justifiably" discharged (Pet. App. A-113). Pacheco's activities were unprotected under the contract because writing and distributing the leaflet exceeded his authority as a union shop chairman and because the contents of the leaflet adversely affected the "harmonious relationship" between the Union and petitioner (Pet. App. A-110 to A-111).

2. Upon charges filed by Pacheco, the Board, adopting the decision of the administrative law judge in pertinent part, concluded that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C.

158(a)(1) and (3), by suspending and discharging Pacheco for distributing the leaflet (Pet. App. A-16, A-43 to A-44).[4] The Board declined to defer to the arbitrator's decision since he had failed to address the statutory issues and his decision was clearly inconsistent with the purposes and policies of the Act (Pet. App. A12-A21); as the law judge had explained (Pet. App. A-54 to A-55):

> The decision does refer to the concept of "protected activitity," but the arbitrator defines that term in a sense totally at odds with the statute, and his statement of the issue presented indicates that he felt confined solely to contractual questions: "The issue before me was *not* whether certain employees thought unsafe conditions existed, but whether Pacheco exceeded the Contract in doing what he did" * * *. The arbitrator nowhere conveys an awareness of the statutory principles implicated in such an issue, and his decision, in my view, abridges those principles.

The law judge observed that Section 7 of the Act, 29 U.S.C. 157, protects the right of employees "to communicate with fellow employees concerning their common working conditions" (Pet. App. A-34). The time and manner of Pacheco's distribution breached no regulation of petitioner (Pet. App. A-34 to A-39). Further, the law judge explained that Pacheco's "zealous and dramatic expression of his concern [over safety problems] does not deprive him of the Act's protection" (Pet. App. A-43). Pacheco could have reasonably regarded 28 injuries as "serious" (Pet. App. A-42 to A-43); "[t]he assertion in the leaflet that [petitioner's] fear of

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[4]In addition, the Board found that petitioner had violated Section 8(a)(1) of the Act by threatening and discharging other employees for protected conduct. Pet. App. A-44 to A-45, A-74, A-86. The court of appeals enforced the Board's order with respect to the discharged employees, but found it unnecessary to consider the threat. *Pioneer Finishing Corp.* v. *NLRB*, No. 81-1038 (1st Cir. Nov. 23, 1981), slip op. 5 n.2, 12-17.

increasing costs lay behind its opposition to a safety committee is part of the traditional stuff of labor disputes" (Pet. App. A-44). Finally, the law judge found that Pacheco believed in good faith that the safety committee clause had been agreed upon in the negotiations (Pet. App. A-45 to A-46).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A-2). The court found that the law judge had not "abused his discretion in deciding that the factors calling for deference [to the arbitrator's decision] were not present," since "the arbitrator did not adequately address the statutory issue" (Pet. App. A-5). The court pointed out that the arbitrator "was solely concerned with whether Pacheco had violated the contract by distributing the leaflets" (Pet. App. A-5). It acknowledged that, "when the statutory and contractual issues are congruent," consideration of the "contractual issues may determine the statutory issues." In this case, however (Pet. App. A-6),

> the finding that the contract was violated, even if taken as correct, does not of necessity determine that Pacheco had no protection under the statute. To so determine, the arbitrator would have had to consider the separate, statutory issues: whether the content of the leaflet was protected under the statute and whether the contract waived statutory rights to enter and to distribute the leaflet. These issues require individualized analysis and hence prevent deference where, as here, there is no indication that this analysis has been performed.

The court also sustained the Board's finding that Pacheco's activities were protected by the Act. With respect to the wording of the leaflet, the court explained (Pet. App. A-8):

> While the portrayal of the 28 injuries as serious or crippling was not accurate, we agree with the Board's assessment that the leaflet's characterization of the

injuries was "rhetorical hyperbole" not to be construed as fact by fellow employees. There is no evidence that any misstatements of fact were made maliciously or without some foundation in fact. See *El Mundo Broadcasting Corp., supra,* 108 N.L.R.B. at 1280. We also agree with the Board that the assertion that the company wished to save money is an argument typical to labor disputes, to be interpreted in such a light. Lastly, the Board had reason to conclude that Pacheco was not intentionally maligning the Company when he wrote that he did not think that it would live up to the agreement to include the health and safety clause in the contract. Pacheco genuinely believed that the Company had agreed to the clause during negotiations and that its failure to include the clause was the result of bad faith, not the Company's good faith understanding that the clause was not to be included.

The court agreed with the Board that the contract did not waive the statutory right of employees to distribute union materials; that the fact that Pacheco was off-duty at the time that he entered the premises did not render his activity unprotected; and that the fact that the leaflets were distributed to employees who were at work did not, in the circumstances here, justify Pacheco's discharge (Pet. App. A-9 to A-10).

ARGUMENT

1. Section 10(a) of the National Labor Relations Act, 29 U.S.C. 160(a) vests the Board with exclusive authority to adjudicate and remedy unfair labor practices. See *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 436-437 (1967). Although the Board may in its discretion elect to defer to arbitral processes, it is not compelled to do so when an unfair labor practice has been committed. See *NLRB* v. *Strong*, 393 U.S. 357, 360-362 (1969). When the Board does assert jurisdiction, its unfair labor practice decisions take precedence

over arbitral awards that enforce private contract rights. See *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964).

Consistent with these principles, the Board defers to an arbitration decision only if (1) the arbitrator has considered and disposed of the unfair labor practice issue presented to the Board; (2) the arbitrator's decision is not repugnant to the purposes and policies of the Act; (3) the arbitration procedures are fair; and (4) the parties have previously agreed to be bound by the arbitrator's decision. *Suburban Motor Freight Co.*, 247 N.L.R.B. 146 (1980); *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955). In this case the court of appeals agreed with the Board that the arbitrator had not considered the unfair labor practice issue. Under settled principles, deferral was therefore inappropriate.

As the court of appeals correctly noted (Pet. App. A-6), "the arbitrator's decision did not reflect, directly or indirectly, consideration of any factors germane to the statutory issue." On the contrary, the arbitrator's decision (*id.* at A-5) "clearly evidences that he was solely concerned with whether Pacheco had violated the contract by distributing the leaflets." See also *id.* at A-110 to A-112. In some cases, whether the contract has been violated and whether there has been an unfair labor practice may be essentially the same question. See, *e.g.*, *Liquor Salesmen's Union Local 2* v. *NLRB*, 664 F. 2d 318, (2d Cir. 1981), cert. denied, No. 81-1544 (May 17, 1982). In this case, however, the arbitrator's dubious "finding that the contract was violated, even if taken as correct, does not of necessity determine that Pacheco had no protection under the statute" (Pet. App. A-6). Focusing on the asserted violations of the collective bargaining agreement, the arbitrator manifested no appreciation of the fact that "the Act protects expression that

may not be totally accurate," or that " 'rhetorical hyperbole' is common in labor disputes and must be protected" (Pet. App. A-8, citing *Old Dominion Branch No. 496, National Association of Letter Carriers* v. *Austin*, 418 U.S. 264, 286 (1974); *El Mundo Broadcasting Corp.*, 108 N.L.R.B. 1270, 1278 (1954).[5] Nor did he consider whether the contract waived Pacheco's statutory rights as an "employee" to enter the plant and to distribute the leaflet.[6]

2. Contrary to petitioner's contention (Pet. 22-29), the decision of the court of appeals creates no conflict among the circuits on the only issue in this case. *NLRB* v. *Pincus Brothers*, 620 F. 2d 367 (3d Cir. 1980), on which petitioner primarily relies (Pet. 22-26), is inapposite. The arbitrator in that case had expressly considered and resolved the unfair labor practice issues (see *Pincus Brothers*, 237 N.L.R.B. 1063, 1064 (1978)). Here, by contrast, the arbitrator has not given any hint that he even recognized the unfair labor practice issues involved. See *NLRB* v. *General Warehouse Corp.*, 643 F. 2d 965, 970 n.20 (3d Cir. 1981) (distinguishing *Pincus* on the ground that the *Pincus* arbitrator had discussed the factors relevant to the unfair labor practice

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[5]The arbitrator found (Pet. App. A-109) that Pacheco "grossly exaggerated * * * the safety record of the plant" "with the intent to deliberately mislead." Petitioner contends (Pet. 32-36) that this finding is tantamount to a conclusion that Pacheco's conduct was unprotected under the Act. Having properly refused to defer to the arbitrator's decision, of course, the Board was not bound by his findings of fact. Moreover, as noted in the text, the arbitrator concedes nothing to "rhetorical hyperbole," which is common in labor disputes and protected under the Act.

[6]The arbitrator found (Pet. App. A-111) that Pacheco's "illegal entry into the plant and the circularizing of the captive workers on the 2nd shift were contrary to Article I and Article II, Sections (D) and (E)" of the contract. Article II (D) and (E), however, regulate the Union's conduct of official business within the plant, and, as the law judge and the court found (Pet. App. A-9, A25 to A26, A-29 to A-30, A-32 to A-33), have no application to Pacheco's activity as an employee.

issue). Similarly, *Douglas Aircraft Co.* v. *NLRB*, 609 F. 2d 352, 353 (9th Cir. 1979), is irrelevant. In *Douglas Aircraft* the Ninth Circuit rejected the Board's conclusion that the arbitral award was repugnant to the policies of the Act. See *NLRB* v. *Max Factor & Co.*, 640 F. 2d 197, 203-204 (9th Cir. 1980), cert. denied, 451 U.S. 983 (1981). In this case, the court of appeals found it unnecessary to consider whether the arbitrator's award was repugnant to the policies of the Act since deferral was inappropriate for other reasons (Pet. App. A-7).[7]

In *Liquor Salesmen's Union Local 2* v. *NLRB, supra* (Pet. 25-26), the contract issue and the unfair labor practice issue were the same. The Second Circuit found that the arbitrator's conclusion, based on the contract and past practice, that there had been no change in working conditions "was necessarily dispositive of the statutory issue; if no change in working conditions was imposed, no duty to bargain arose, and no unfair labor practice could have been committed" (664 F. 2d at 325). Here, however, Pacheco's conduct could have violated the contract and still have been protected by the Act (see Pet. App. A-32 to A-39). Similarly, in *NLRB* v. *Motor Convoy, Inc.*, 673 F. 2d 734 (4th Cir. 1982), the court concluded that the arbitrator necessarily found that the employee was not discharged for union activity when he upheld a discharge for cause, because there was a non-discrimination clause in the contract.[8]

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[7]Thus, amicus Council on Labor Law Equality errs in asserting (Br. 15-22) that the decision of the court below conflicts with *Pincus* and *Douglas Aircraft*.

[8]Contrary to the submission of amicus Council on Labor Law Equality (Br. 11-15), nothing in the decision of the court below suggests that an arbitrator's decision is entitled to deference only if the arbitrator explicitly discusses the statute. The court concluded (Pet. App. A-6) that the arbitrator's decision failed to reflect "directly or indirectly" any consideration of the factors relevant to the unfair labor practice issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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